

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

TORAZZI/HAYSLITT *an individual*

Civil No. 13-CV-1605-W (BGS)

Plaintiff,

CITY OF SAN DIEGO, *a municipal corporation*; DANIEL MCLAUGHLIN, *an individual*; and DOES 1-50, *inclusive*,

**ORDER FOLLOWING *IN CAMERA*
REVIEW GRANTING IN PART AND
DENYING IN PART PLAINTIFF'S
MOTION FOR DETERMINATION OF
DISCOVERY DISPUTE**

[ECF No. 17.]

1. INTRODUCTION

On March 4, 2014, Plaintiff Torazzi Hayslett filed a motion for determination of discovery dispute regarding her request for production of peace officer personnel records and internal affairs records. (ECF. No. 17.) On March 14, 2014, Defendants filed an opposition to Plaintiff's motion in which they object to the production of this material on the grounds it is overbroad, irrelevant and privileged under federal law. (ECF No. 18.)

II. DISPUTE BACKGROUND

Plaintiff brought this civil rights action against Defendants alleging causes of action for excessive force, battery, negligence, failure to train (*Monell* liability), false arrest and intentional infliction of emotional distress. (ECF No. 1 at 2-12.) Specifically, Plaintiff contends she was subjected to excessive force at the hands of Officer Daniel McLaughlin and falsely arrested for

1 approaching firefighters who were working to put out a fire which had engulfed her house. (*Id.*
 2 at 4-5.) Plaintiff's motion for determination of discovery dispute concerns various requests for
 3 the production of documents that fall into two categories: (1) Complaints/ Investigations
 4 regarding Officer Daniel McLaughlin (RFP Nos. 2, 9-13); and (2) Personnel Records
 5 (Performance Evaluations/Training Documents) regarding Officer Daniel McLaughlin (RFP
 6 Nos. 3-8). (*See* ECF No. 17 at 3.)

7 In response¹ to these requests, Defendants assert: a.) the records sought are irrelevant and
 8 cannot lead to admissible evidence; b.) the requests are overbroad and impermissible in scope;
 9 and c.) the material is subject to the official information²/executive privilege³. (ECF. No. 18 at
 10 3-6.) Defendants have submitted a declarations from an agency official asserting the executive
 11 and official information privilege as required by *Hampton v. City of San Diego*, 147 F.R.D. 227
 12 (S.D. Cal. 1993) as well as a privilege log. (Doc. No. 18-4.) Defendants have also lodged the
 13 disputed documents at issue for *in camera* review.

14 **III. STANDARD OF REVIEW**

15 **A. RELEVANCE**

16 Defendants have objected to Plaintiff's requests for Internal Affairs (IA) files;
 17 Performance Reports and Transfers/Promotions on the grounds that the requests seek irrelevant
 18 information and are overbroad. Under the Federal Rules of Civil Procedure, “[p]arties may
 19 obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or

20 ¹To the extent Defendants have objected on other grounds to these requests, the Court will not address
 21 those not briefed by Defendants in the opposition brief and only asserted through blanket objections.
 22 Defendants have waived these objections by failing to provide reasons for the objections as required under Fed.
 23 R. Civ. Proc. 34(b)(2)(B).

24 ²The “official information” privilege is also referred to as the “law enforcement” privilege and
 25 “government” privilege, and falls into the broad category of “executive” privileges. *See Torres v. Kuzniasz*, 936
 26 F. Supp. 1201, 1209 (D.N.J. 2006); *Gearhart v. Solano County*, No. 2:07-CV-1444-LKK/GGH, 2008 WL
 27 2560703, at *4 (E.D. Cal. June 24, 2008); *Al-Kidd v. Gonzales*, No. CV 05-093-EJL-MHW, 2007 WL 4391029,
 28 at *4 (D. Idaho Dec. 10, 2007).

³The common law executive privilege shares roots with law enforcement's need to protect its records,
 in that there is a “need to minimize disclosure of documents whose revelation might impair the necessary
 functioning of a department of the executive branch.” *Id.* When applied to law enforcement, *this privilege is*
 sometimes called the “government privilege,” “official information privilege,” or “law enforcement privilege,”
 but still shares terminology and principles with the executive privilege. *Torres v. Kuzniasz*, 936 F. Supp. 1201,
 1209 (D.N.J. 2006)(emphasis added).

1 defense.” *See Fed.R.Civ.P. 26(b)(1)*. Furthermore, “[r]elevant information need not be
 2 admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of
 3 admissible evidence.” *Id.* A relevant matter is “any matter that bears on, or that reasonably
 4 could lead to other matters that could bear on, any issue that is or may be in the case.”
 5 *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978).

6 **B. Official Information / Executive Privilege**

7 Defendants also assert the disputed documents are privileged under the “official
 8 information” privilege. Federal common law recognizes a qualified privilege for official
 9 information. *Kerr v. U.S. Dist. Ct. for the Northern Dist.*, 511 F.2d 192, 198 (9th Cir.1975). The
 10 official information privilege is also variously known as “the Government Privilege,” “law
 11 enforcement privilege,” and “executive privilege. *See Deocampo v. City of Vallejo*, 2007 WL
 12 1589541 (E.D. Cal. 2007) at *4 (citing references for each variant). In determining what level of
 13 protection should be afforded by this privilege, courts conduct a case-by-case balancing analysis,
 14 in which the interests of the party seeking discovery are weighed against the interests of the
 15 governmental entity asserting the privilege. *Kelly v. City of San Jose*, 114 F.R.D. 653, 660 (N.D.
 16 Cal. 1987); *Miller*, 141 F.R.D. 292, 300 (C.D. Cal. 1992); *Hampton*, 147 F.R.D. at 230-31. In
 17 the context of civil rights suits against police departments, this balancing approach should be
 18 “moderately pre-weighted in favor of disclosure.” *Kelly*, 114 F.R.D. at 661.

19 However, the party invoking the privilege must at the outset make a “substantial threshold
 20 showing” by way of a declaration or affidavit from a responsible official with personal
 21 knowledge of the matters to be attested to in the affidavit. *Soto*, 162 F.R.D. at 613 (*citing Kelly*,
 22 114 F.R.D. at 669); *see also Hampton*, 147 F.R.D. at 230.

23 The affidavit or declaration from the agency official must include: (1) an
 24 affirmation that the agency generated or collected the material in issue and has in
 25 fact maintained its confidentiality . . . , (2) a statement that the official has
 26 personally reviewed the material in question, (3) a specific identification of the
 27 governmental or privacy interests that would be threatened by disclosure of the
 28 material to plaintiff and/or his lawyer, (4) a description of how disclosure subject

1 to a carefully crafted protective order would create a substantial risk of harm to
 2 significant governmental or privacy interests, (5) and a projection of how much
 3 harm would be done to the threatened interests if the disclosure were made.

4 *Id.* at 230-31 (citing *Kelly*, 114 F.R.D. at 670).

5 If the party invoking the privilege fails to satisfy this threshold burden the documents in
 6 issue should be disclosed. *Soto v. City of Concord*, 162 F.R.D. 603, 613 (N.D. Cal. 1995). If the
 7 threshold showing requirements are met, the court must weigh whether confidentiality outweighs
 8 the requesting party's need for the information. *Hampton*, 147 F.R.D. at 231; *see also Kelly*, 114
 9 F.R.D. at 657-58. The factors courts consider in conducting a case by case balancing analysis
 10 include how the requested information is relevant to the litigation or is reasonable calculated to
 11 lead to the discovery of admissible evidence, the interests of plaintiff's that would be harmed if
 12 the material is not disclosed, how the harm to plaintiff would occur and how extensive it would
 13 be, why it would be impossible or impracticable to acquire information of equivalent value
 14 through alternative means, the governmental or privacy interests threatened by disclosure of the
 15 material to plaintiff and/or his lawyer, and how disclosure under a tightly drafted protective
 16 order would create a substantial risk of harm to significant governmental or privacy interests.

17 *See Hampton*, 147 F.R.D. at 231.

18 The Court finds, in reviewing the agency official's declaration, that Defendants have met
 19 the threshold requirements. (*See* ECF No. 18-4; Declaration of David Ramirez.) Therefore, the
 20 Court will weigh Plaintiff's need for the information against Defendants' interest in
 21 confidentiality of any requested, relevant information in the Discussion section below.

22 **IV. DISCUSSION**

23 The specific documents in dispute are: IA File Nos. 113 and 129; Performance Report
 24 Nos. 4, 78, 84, 88, 97, 99, 101, 104, 107-109, 112, 115, 123, and 128; and Transfer/Promotion
 25 Nos. 95, 106, 111, 116, 118, 121, and 122.

26 **A. IA File Nos. 113 and 129 in response to Plaintiff's RFP Nos. 9-13.**

27 Plaintiff contends IA File Nos. 113 and 129 are responsive to its Requests for Production
 28 9 through 13 without attempting to pinpoint *which specific Request* out of this group of five

1 requests, truly speaks to IA File Nos 113 and 129. *See* Fed. R. Civ. P. 7(b)(1) (requiring motions
 2 requesting a court order to “state with particularity the grounds for seeking the order.”) In
 3 addition to conducting an *in camera* review of these documents, the Court should not have to
 4 also undertake Plaintiff counsel’s work to determine which particular RFP (drafted and
 5 propounded by Plaintiff) seeks the internal affairs documents in dispute. Nevertheless, the Court
 6 has reviewed the five RFPS identified and finds Plaintiff’s Request No. 9 (for any informal or
 7 formal complaint concerning Officer McLaughlin without limitation), Request No. 12 (for
 8 inmate complaints) and Request No. 13 (for all documents relating to any internal investigations
 9 of Officer McLaughlin from 2005 to the present) are unnecessarily overbroad and are not
 10 tailored to lead to the discovery of admissible evidence. Fed. R. Civ. P. 26(b)(1). In these RFPs,
 11 Plaintiff impermissibly requests reports or complaints made against Officer McLaughlin with
 12 respect to any subject matter, or in the case of Request No. 12, requests obviously irrelevant
 13 subject matter.

14 The Court finds Requests No. 10 and 11, which respectively seek civilian and internal
 15 complaints against Officer McLaughlin from 2005 to the present as to “battery, abuse, assault,
 16 false arrest, unlawful detention, unlawful search or seizures, excessive force, false reports, false
 17 statements or other improper procedures” are relevant only to the extent they seek records of
 18 complaints or investigations against Officer McLaughlin that allege Plaintiff’s claims of
 19 excessive force, battery, negligence, false arrest or intentional infliction of emotional distress.
 20 Such documents may lead to the discovery of admissible evidence because the information
 21 sought could arguably be used pursuant to Fed. R. Evid. 404(b)⁴ and may be relevant on the
 22 issue of punitive damages. *See Hampton v. City of San Diego*, 147 F.R.D. 227, 229 (S.D. Cal.
 23 1993) (finding information concerning other instances of conduct relevant to punitive damages
 24 as it “may lead to evidence of a continuing course of conduct reflecting malicious intent). After
 25 reviewing the documents *in camera*, the Court finds **IA File No. 113** is relevant and responsive
 26 to Plaintiff’s requests Nos. 10 and 11. IA File No. 129 is not relevant to this case because it does
 27

28 ⁴Rule 404 of the Federal Rules of Evidence concerns permitted and prohibited uses of
 “Character Evidence; Crimes or Other Acts.” Fed. R. Evid. 404.

1 not involve a complaint against, or an investigation of, Officer McLaughlin.

2 As to IA File No. 113, the Court finds Plaintiff's need for documents related to other
 3 complaints and investigations against Officer McLaughlin with respect to excessive force,
 4 battery, negligence, false arrest or intentional infliction of emotional distress outweighs
 5 Defendants' confidentiality interest. This information may lead to valuable motive, intent, and
 6 pattern evidence as well as credibility and impeachment evidence. Plaintiff cannot obtain this
 7 information through alternative means. Defendants' assertion that producing this information
 8 would (1) discourage persons who may provide information or (2) diminish the confidentiality of
 9 others who have provided information to the San Diego Police Department is not sufficient to
 10 override Plaintiff's need, especially if the production is subject to a protective order. (Doc. No.
 11 18-4 ¶¶6-9); *see Kelly*, 114 F.R.D. at 664 (stating that "no empirical study supports the
 12 contention that the possibility of disclosure would make officers who participate (as respondents
 13 or as investigators) in internal affairs investigations less honest," and "in the absence of special
 14 circumstances proved by law enforcement defendants, courts should ascribe little weight to a
 15 police department's purported interest in preserving the anonymity of citizen complainants").
 16 Providing the relevant citizen complaint / internal affairs information subject to a protective
 17 order will not significantly harm the government interest in keeping disciplinary records
 18 confidential and will not undermine the objectives of improving law enforcement through
 19 discipline. **Accordingly, Defendants are ORDERED to produce IA File No. 113 with**
 20 **sensitive personal information redacted and subject to protective order.** Courts have
 21 fulfilled a plaintiff's need for discovery while protecting a defendant's privacy by ordering the
 22 production of documents subject to a protective order limiting the access to the material at issue
 23 to plaintiff, his counsel and those experts who require such information to formulate an opinion.
 24 *Soto v. City of Concord*, 162 F.R.D. 603, 617 (N.D. Cal. 1995.) The Court finds a protective
 25 order will serve the interests of both parties in facilitating discovery and yet protecting the
 26 privacy of the parties involved. Therefore, the Court orders the parties to enter into a protective
 27 order governing the documents the Court has ordered to be disclosed.

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1 Plaintiff also claims there are several complaints and investigations against Officer
 2 McLaughlin which do not appear on Defendants' privilege log, but are relevant to this case.
 3 Plaintiff contends one case in particular, entitled *Britton/Ross v. McLaughlin*, concerned a fatal
 4 officer-involved shooting and use of excessive force in 2009. (ECF No. 17 at 7.) Defendant
 5 responds that the *Britton/Ross* file, which Plaintiff seeks, was not listed on Defendants' privilege
 6 log because it was purged under the San Diego Police Department's expungement policy which
 7 eliminates records that are five-years-of-age or older. (ECF No. 18-3 at 3.) Plaintiff is advised
 8 that this court cannot compel Defendants to produce documents that no longer exist or are not in
 9 Defendants' possession or control. *Manning v. General Motors*, 247 F.R.D. 646, 652 (D. Kan.
 10 2007).

11 **B. Performance Report Nos. 4, 78, 84, 88, 97, 99, 101, 104, 107-109, 112, 115, 123,**
 12 **and 128 in response to Plaintiff's RFP Nos. 3-8.**

13 Plaintiff contends Performance Report Nos. 4, 78, 84, 88, 97, 99, 101, 104, 107-109,
 14 112, 115, 123, and 128 are responsive to its Requests for Production 3 through 8 without
 15 attempting to pinpoint *which specific Request* out of this group of six requests implicates the
 16 various performance reports sought. After careful review of the six requests identified, the Court
 17 concludes RFP No. 6, which requests "all performance evaluations of Officer Daniel
 18 McLaughlin from 2005 to the present," best targets the performance reports Plaintiff seeks.
 19 However, the Court finds Plaintiff's request for *all* performance evaluations of Officer
 20 McLaughlin for a span of 9 years is overbroad. The performance evaluation forms indicate the
 21 officers are largely evaluated in areas which bear no relationship to the claims of excessive
 22 force, battery, negligence, false arrest or intentional infliction of emotional distress presented in
 23 this case. Therefore, the Court finds only those portions of performance evaluations that relate
 24 to judgment, law enforcement and corrections procedures, enforcement tactics, and knowledge
 25 of policies and procedures are relevant to Plaintiff's claims. *See Soto v. City of Concord*, 162
 26 F.R.D. 603, 615 (N.D. Cal. 1995) (finding that performance evaluations "may be quite relevant
 27 to issues involved in Plaintiff's excessive force claim, because such documents may reveal the
 28 defendant officers' patterns of behavior"). The Court will also limit the relevant portions of the

1 performance evaluations of Defendant to five years prior to the incident at issue in this case,
 2 which occurred on October 19, 2012. Evaluations more than seven-years-old would be of little
 3 probative value and unlikely to lead to the discovery of admissible evidence. Additionally, the
 4 burden on Defendants to produce evaluations more than seven-years-old outweighs any
 5 relevancy they may have. The relevant portions of personnel information and performance
 6 evaluations identified above are found in Performance Report Nos. 107, 109, 112, 115, 123, and
 7 **128. Accordingly, Defendants are ORDERED to produce Performance Report Nos. 107,**
 8 **109, 112, 115, 123, and 128 subject to protective order.**

9 **C. Transfer/Promotion Nos. 95, 106, 111, 116, 118, 121, and 122 in response to**
 10 **Plaintiff's RFP Nos. 3-8.**

11 Plaintiff contends Transfer and Promotion documentation Nos. 95, 106, 111, 116, 118,
 12 121, and 122 are also responsive to its Requests for Production 3 through 8 without attempting
 13 to pinpoint *which specific Request* out of this group of six requests implicates the various
 14 promotion records sought. Of the six requests identified, the Court concludes RFP No. 7, which
 15 requests all “transfers, promotions, demotions, and honors” of Officer McLaughlin from 2005 to
 16 the present, aptly identifies the promotion materials Plaintiff seeks.

17 The Court finds Defendant's Transfer and Promotion records are relevant to Plaintiff's
 18 *Monell* claim against the County for its policies of hiring, retention and promotion and relevant
 19 to Plaintiff's excessive force claim. *See Soto*, 162 F.R.D. at 615 (explaining “information on
 20 promotions, training records, letters of recommendation, interviews, employee orientation and
 21 employment applications ... may be quite relevant to issues involved in Plaintiff's excessive
 22 force claim, because such documents may reveal the defendant officers' patterns of behavior, as
 23 well as the City's response to such behavior.”)

24 Defendants object to the production of Officer McLaughlin's early promotion records
 25 from 2001. They argue the older records have little probative value to an alleged excessive force
 26 incident which occurred in 2012. The Court agrees; therefore, the Court will limit the relevant
 27 portions of the transfer and promotion records to five years prior to the incident at issue in this
 28 case, which occurred on October 19, 2012. Promotion records from early on in Officer

1 McLaughlin's career would be of little probative value and unlikely to lead to the discovery of
2 admissible evidence. Additionally, the burden on Defendants to produce early promotion
3 records outweighs any relevancy they may have. **Accordingly, Defendants are ORDERED to**
4 **produce Transfer / Promotion records Nos. 106, 111, 116, 118, 121, and 122 subject to**
5 **protective order.**

6 **V. CONCLUSION**

7 Following its *in camera* review and in accordance with the Court's analysis as explained
8 above, Defendants shall produce the following documents **no later than April 4, 2014:**

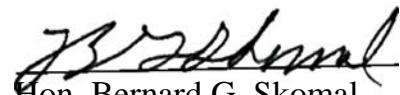
9 1.) IA File No. 113 with sensitive personal information redacted and subject to
10 protective order;
11 2.) Performance Report Nos. 107, 109, 112, 115, 123, and 128; and
12 3.) Transfer / Promotion records Nos. 106, 111, 116, 118, 121, and 122

13 Defendants are to redact sensitive personal information that has no bearing on this case.

14 The production of these documents shall be subject to a protective order.

15 **IT IS SO ORDERED.**

16 DATED: March 21, 2014

17 
18 Hon. Bernard G. Skomal
19 U.S. Magistrate Judge
20 United States District Court